Kluwer Arbitration Blog

Ireland on the Global Stage: A Whirlwind Tour of Developments in International Arbitration

Diora Ziyaeva (Dentons US LLP) and Catherine Gilfedder (Dentons UK LLP) · Sunday, January 21st, 2024

The 11th annual Dublin International Arbitration Day took place on 17 November 2023 at the Distillery Building, Dublin 7. A conference famed for its action-packed schedule, range of panels on hot topics, and eminent supporters, the event was exceptionally well attended by international and domestic attendees with one of the biggest turn-outs yet.

Keynotes from Paul McGarry SC, President of Arbitration Ireland, and Irish Attorney General Rossa Fanning SC emphasised Ireland's progression on the global arbitration stage, mentioning developments including the recent signing into law of legislation allowing third-party funding in international commercial arbitration.

Enforcement of Intra-EU Arbitral Awards: Latest Developments From the UK, Australia, the US and EU

The panels kicked off with a discussion of the "Enforcement of Intra-EU Arbitral Awards: Latest Developments from the UK, Australia, the US and EU", moderated by David Herlihy (Allen & Overy). Comparing the post-Achmea saga of intra-EU investment treaty arbitrations to the famous "Rumble in the Jungle" fight, David highlighted the various "rounds" so far including jurisdictional challenges, annulment applications under the ICSID and New York Conventions, and now the playing out in national courts of applications and objections to recognition and enforcement. The panel consisted of Ruth Byrne KC (King & Spalding), Catherine Gilfedder (Dentons), Lucinda Low (Steptoe & Johnson), Markus Perkams (Addleshaw Goddard), Lena Sandberg (Gibson, Dunn & Crutcher) and Jeffrey Sullivan KC (Debevoise & Plimpton).

Jeffrey, discussing the Court of Justice of the European Union (CJEU)'s approach to date, observed that its case law has been almost entirely consistent in finding that intra-EU arbitral awards are incompatible with EU law. Despite the fact that the European Commission's position has of course been rejected in other fora, the EU continues to "get in the boxing ring" and advance its position by challenging intra-EU awards.

Beginning a global tour of developments, Markus examined the approach of EU member state courts. The German Federal Supreme Court has found, following Achmea, that arbitration

agreements intra-EU BITs are contrary to EU law on the basis that tribunals that have been created outside of the EU treaties, like any determinations of EU law by those tribunals, could not be tested by the CJEU. The courts of France and Luxembourg have followed a similar approach, and declined to enforce resulting awards.

Turning to the UK, Ruth highlighted the much more investor-friendly position in the UK. The Commercial Court's recent decision in *Infrastructure Services Luxembourg SARL & Anor v Kingdom of Spain* made clear that (following earlier case law including *Micula v Romania*), intra-EU ICSID awards will generally be enforceable in the UK, since the ICSID convention was implemented and the UK government's obligations under it were established before acceding to the EU (see coverage on the Blog here). Spain has, however, been granted permission to appeal the *Infrastructure Services Luxembourg* decision.

Lucinda next looked at the US position, noting the courts have taken a sharply divergent approach, with a number of Federal District Court judges dismissing jurisdictional challenges to intra-EU ICSID awards (*Blasket Renewable Investments v. Kingdom of Spain*, No. 1:21-cv-3249-RJL (D.D.C. Mar. 29, 2023)) while others have upheld them (*NextEra Energy Global Holdings B.V., et al. v. Kingdom of Spain*, 19-cv-01618 (TSC) (D.D.C. Feb. 15, 2023)). These decisions have been appealed to the Circuit Court, as has a decision refusing to enforce an UNCITRAL decision against Spain on the basis that no valid arbitration agreement existed between Spain and the EU investors as a matter of EU law.

As for Australia, Catherine explained there are a number of extant enforcement applications against Spain in this jurisdiction. The Australian High Court is the first apex court to consider the issue post-*Achmea*, and in May 2023 adopted a similarly pro-investor stance to the English Commercial Court, in another decision in favour of *Infrastructure Services* decided largely on the basis of Spain's waiver of sovereign immunity (indeed, the High Court's decision in *Infrastructure Services* was persuasive before the Commercial Court). Catherine observed that the Commission still has outstanding applications to intervene before the lower Australian courts in a number of enforcement applications.

Lena finally provided insight into another approach that the EU has begun to take following *Achmea* in an effort to resist the enforcement of arbitral awards, which is to characterise them as state aid over which the Commission has competence. This is quite a new strategy and it remains to be seen how it will work in practice. The Commission has extended this theory to investors from outside the EU, using creative arguments to establish a jurisdictional link with investors from states including Jersey and Japan.

Arbitration, Bankruptcy & Sanctions

The second panel, focusing on "Arbitration, Bankruptcy & Sanctions", was moderated by Ronnie Barnes (Cornerstone Research) and addressed the effects that bankruptcy of a party or sanctions imposed on a party can have on a pending arbitration. The panel included Shawn Conway (Conway & Partners), Diora Ziyaeva (Dentons), Matthew Alder (Troutman Pepper), and Stavros Pavlou (Pavlou & Associates). To set the stage, Ronnie asked the panelists to consider a hypothetical problem involving an €800 million cross-border dispute over delays in the production of a superyacht, as well as the imposition of US and EU sanctions on some of the entities involved,

and a bankruptcy of one of the contracting parties.

Ultimately, the particular effects that bankruptcies can pose depend entirely on the specific jurisdiction involved. Shawn explained that, under Dutch law, the tribunal is by virtue of the arbitration agreement, the primary forum for dealing with contractual disputes between the parties – not a bankruptcy court. Further, Dutch law distinguishes between monetary and non-monetary claims, and thus a tribunal could proceed to deal with any non-monetary claims despite any bankruptcy implications on monetary claims (e.g. making declarations as to the validity of an agreement, the validity of a guarantee or a declaration of liability, etc.).

Diora explained that US federal courts impose an automatic stay on litigation proceedings in the event of a bankruptcy declaration. This is not necessarily a permanent stay and a claimant can apply to lift it. However, doing so obviously requires a great amount of work and might not be worth it in the event that a respondent is bankrupt. Whether or not the automatic stay applies to arbitrations has not been consistently addressed in the US. As Matthew noted**,** US courts have gone back and forth on their position. Generally, however, the courts have determined that bankruptcy law will apply automatically to arbitrations. Thus, parties involved in an arbitration with an entity that has declared bankruptcy should expect that proceeding to be stayed.

The issue from the perspective of a Cypriot entity is quite similar. As Stavros explained, in Cyprus, there is an automatic stay on arbitration proceedings in the event of a bankruptcy in respect of all types of relief and it is unlikely that a court would allow an arbitration to continue if there is a claim for damages. In addition, it is not possible to have two sets of lawyers acting for a respondent. The appointment of a lawyer due to the bankruptcy will automatically terminate the original lawyer's involvement unless the trustees continue to appoint that lawyer. It is therefore very unlikely that an arbitration would continue as a trustee would not want to remain in an arbitration if it is seen as an unnecessary expense on the bankruptcy estate.

Likewise, the effects of sanctions on an arbitration proceeding differ from jurisdiction to jurisdiction.

As Diora explained, in the US and EU, the first consideration is whether the claimant is a sanctioned entity – i.e. more than 50% owned by the sanctioned person or entity. While the 50% rule is the typical standard, where there has been a transfer or modification to the company orchestrated to ensure the sanctioned person now owns less than 50%, the US and EU still find control satisfied.

Further, the sanction issue could have broader effects than just on an arbitration – affecting pending bankruptcies as well. In the bankruptcy of a respondent party, the assets of the respondent will be divided and divvied out to creditors. However, where sanctions are present, those assets could be subject to a freeze. This would obviously make enforcing an arbitration award against the sanctioned party much more difficult.

Stavros added that this issue affects more than just the enforcement of an arbitration award, as the tribunal itself could be barred from accepting payment from a sanctioned entity and thus unable to receive administrative fees. In addition, as Shawn noted, it could be difficult or impossible for counsel for the sanctioned entity to receive payment. Though there are EU regulations regarding the provision of legal services to sanctioned people/entities, banks are scared about money coming from Russia, and the banks could make it impossible to receive funds for fear they may be

sanctioned.

Finally, even if payment is possible, the presence of sanctions could call into question whether the dispute is arbitrable at all. Ultimately, sanctions will at least temporarily grind an arbitration to a halt and could continue to do so indefinitely.

Conclusion

Following a full day of excellent panels and networking, wrapped up with the famous “quick-fire round” in which the panellists each spoke for five minutes on a hot topic of their choice, the delegates proceeded to a lively reception and dinner in the beautiful King’s Inns, followed by traditional Irish music.

The event was a success and worthy of the attention received in light of Ireland’s continued development as an arbitration hub.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Sunday, January 21st, 2024 at 8:55 am and is filed under Bankruptcy, Enforcement, Ireland, Sanctions
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.